

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
Implementation of the Pay Telephone
Reclassification and Compensation Provisions
of the Telecommunications Act of 1996

NSD File No. L-99-34

CC Docket No. 96-128

COMMENTS OF FLYING J

Pursuant to the Common Carrier Bureau's Public Notice released August 20, 2001 (DA 01-1967), Flying J Inc. and TON Services, Inc. (jointly, "Flying J") submit the following comments relating to the Commission's Second Order on Reconsideration in the above matter, released April 5, 2001.

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INTRODUCTION

The Second Order on Reconsideration (“Second Order”) appropriately placed responsibility on the first interexchange carrier (“IXC”) to track compensable calls and pay compensation to payphone service providers (“PSPs”). Flying J fully supports that action. However, the Second Order raised several issues that require clarification, particularly with regard to the relationships among and responsibilities of PSPs, IXCs, and switch-based resellers (“SBRs”) under the payphone compensation system set forth in the Second Order.

The system should implement the following fundamental principles:

- PSPs should be fairly compensated for each and every completed intrastate and interstate call from their payphones. *See* 47 U.S.C. § 276(b)(1)(A).
- A completed call is a call that is answered by the called party (not by a platform, switch, or operator).
- The first IXC to which a call is routed by a local exchange carrier (“LEC”) should be responsible for paying payphone compensation. If a coinless payphone call is completed by a LEC without being transferred to an IXC, then the primary LEC that routes a completed call should be responsible for paying payphone compensation.
- While the payor should be ultimately responsible and arrange for tracking of compensable calls, SBRs should provide tracking information to their IXCs for calls completed through their facilities, provided the IXCs reimburse the SBRs for the cost of providing such information; and

- SBRs should not reimburse IXC for payphone compensation paid to PSPs and tracking costs incurred by IXC for non-completed calls.

On the basis of the foregoing principles, Flying J requests the Commission to clarify the Second Order as follows:

1. Reiterate that a completed call is a call answered by the called party, and clarify that a call that is routed to a switch or platform of an IXC or SBR, but not answered by the called party, is not a completed call, and is not eligible for payphone compensation; or in the alternative, modify the definition of a completed call to include a call routed to a platform or switch, whether the platform or switch is owned by the first IXC or by a third party, including an SBR.
2. Clarify that a LEC that completes a coinless payphone call without routing it to an IXC is responsible to pay payphone compensation to the PSP, and to provide tracking and reporting to the PSP, to the same extent as the first IXC is responsible under the Second Order for calls routed to the IXC from a LEC.
3. Clarify that an SBR is not responsible to reimburse its IXC for non-completed calls, nor for the costs of tracking such calls, unless the SBR fails, upon request by the IXC, to provide tracking information to its IXC for completed calls.
4. Clarify that an SBR may obtain reimbursement from its IXC for the SBR's cost of tracking completed payphone calls from its platform to the point of completion, and the cost of providing such tracking information to the IXC.

5. Reiterate the reporting requirements set forth in the Second Order, but clarify that reports are to be provided to PSPs for all calls, including both completed and non-completed calls, and require IXC's to maintain call detail records of all calls and to make such records available to PSPs, on request.
6. Clarify that the system set forth in the Second Order, clarified as described above, applies both prospectively and retroactively to October 7, 1997.

I. THE COMMISSION SHOULD RETAIN THE DEFINITION OF A COMPLETED CALL AS ONE ANSWERED BY THE CALLED PARTY.

- A. **The Commission should reject the proposal to redefine a completed call to include all calls routed to an SBR's platform or switch, or, in the alternative, the Commission should redefine a completed call to include all calls to a platform or switch, whether owned by an IXC or an SBR.**

Worldcom proposes to redefine a completed call to include "one that is handed off to switch-based reseller (SBR) customers that do not have prior agreements with all payphone service providers (PSPs) to pay dial around compensation." Worldcom Petition at 1.¹ Worldcom is apparently advancing this proposal in order to relieve IXC's of the responsibility, imposed initially in the First Payphone Order and reconfirmed in the Second Order, to track a payphone call routed to an SBR to determine whether it is actually completed (i.e. answered by the called party) and thus compensable. Worldcom

¹ The qualification (limiting the definition to SBRs that "do not have prior agreements with all payphone service providers (PSPs) to pay dial around compensation") is meaningless, as Worldcom well knows, since there is no practical possibility that any SBR will ever have agreements with all PSPs. As the Commission has noted, SBRs are incapable of even identifying all PSPs, and even if SBRs could identify all PSPs, it is unlikely in the extreme that an SBR could or would negotiate contracts with thousands of PSPs. Thus as a practical matter, every SBR would be swept within the definition proposed by Worldcom.

touts the benefits of such a redefinition to IXC's and PSPs (simplicity, certainty, efficiency, feasibility, cost savings, full payment, and dispute avoidance). *See* Worldcom Petition at 2, 4. However, Worldcom fails to note that under its proposal, SBRs would be required to reimburse IXC's for all calls routed to the SBR's switch, *including calls that are never answered by the called party*.

Such a result lacks fundamental fairness, because such non-completed calls, by definition, do not generate any revenue to the SBR from which reimbursement could be made to the IXC.² Thus the SBR would be forced to cover the expense of reimbursing IXC's for non-completed calls from the revenue generated from its completed calls. The inevitable result would be to drive up the price of a completed call, to the detriment of SBRs and the consuming public. Indeed, the cost squeeze resulting from such a "solution" could easily put many SBRs out of business.³ Thus Worldcom's proposal can

² Typically, while the SBR earns no revenue from a call not answered by the called party, the IXC earns revenue from the SBR for such calls, particularly where the SBR is obligated to pay the IXC on a time-dependent (e.g. minutes of use) basis. That is, the SBR pays its IXC for calls completed to its platform, whether or not they are completed to the called party. Thus the IXC already earns revenue from calls to an SBR platform, even when such calls are not ultimately completed, which underscores the inherent unfairness of requiring SBRs to reimburse IXC's for calls not answered by the called party. As to the PSP, on the other hand, while it could be argued that a PSP would reap a windfall by receiving compensation for calls that are routed to an SBR's platform but not ultimately answered by the called party, the fact remains that even such non-completed calls occupy a payphone until the calling party hangs up, and such calls render the payphone unavailable for possible use for a completed call. Thus it is not wholly unfair to compensate a PSP even for non-completed calls.

³ AT&T reports that approximately 70% of calls to its pre-paid platform are completed. *See* AT&T Petition at 3, fn. 4. Assuming the same ratio applied to SBR platforms, then 30% of all calls to an SBR platform are uncompleted. Under Worldcom's proposal, the PSPs would reap a windfall by receiving compensation for all of those uncompleted calls. On the flip side, the SBR would be required to reimburse its IXC for payphone compensation paid for all such calls. Depending on the SBR's markup (which is likely to be narrow, since SBRs compete with IXC's primarily on price, and cannot afford to set prices at or above the IXC's retail prices for the same service), it may well be that in order to cover the cost of reimbursement of payphone compensation on the 30% of calls for which an SBR would earn no revenue, the SBR would have to raise rates on the remaining 70% of calls to a level that would not allow it to compete with its IXC and

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only be characterized as anti-competitive (since every major IXC competes with its own resellers) and not in the public interest.⁴

Worldcom's proposal is anti-competitive not just because IXCs compete generally with SBRs (i.e. by offering to the consuming public the same long distance services at retail as are sold to SBRs at wholesale), but because the major IXCs, including Worldcom, operate their own platforms (e.g. subscriber 800, collect, debit card, calling card, or pre-paid card platforms, common examples being 1-800-COLLECT and 1-800-CALLATT), which compete directly with their own SBRs. Worldcom's proposal would exclude from the definition of a completed call those calls to the IXC's interim platform that are not answered by the called party, presumably because IXCs are able to track such calls to determine whether they are answered by the called party. To that extent, Worldcom appears to endorse the Commission's original definition of a completed call, at least with respect to calls completed on its own network. Thus Worldcom would avoid having to pay PSPs for calls to its own platform that are not answered by the called party.

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still make a profit. That is, the existence of a de facto price ceiling for SBRs (i.e. the IXC's retail price), coupled with the need to increase rates to cover reimbursement for uncompleted calls, could well make it economically impossible for an SBR to survive.

⁴ The risk to SBRs from Worldcom's proposal will also be increased by the substantial possibility that unscrupulous PSPs could greatly enhance their profits from payphone calls by generating numerous phantom calls to SBR platforms (e.g. through an autodialer that would disconnect within a short time after connection to the platform), for which the IXC would blithely pay the PSP without any incentive to police the fraud, knowing that it would obtain reimbursement from the SBRs. The vast majority of SBRs, on the other hand, are ill equipped to detect such fraud, much less to prevent it or to seek remedies after the fact.

At the same time, however, Worldcom's proposal would impose on SBRs the duty to reimburse IXCs for all calls routed to an SBR platform, including calls not answered by the called party. The double standard, inequity, and anti-competitive effect inherent in Worldcom's proposal are obvious.

A further anticompetitive effect of Worldcom's proposal stems from the fact that some of the larger IXCs also operate their own payphones, and hence are PSPs as well. By paying PSPs (including themselves) for calls to the SBRs' switches that are not ultimately answered by the called party, and then seeking reimbursement from the SBRs for such calls, IXCs would create a windfall for themselves at the expense of their SBRs. That is, for a vertically integrated IXC that also operates payphones, the IXC will pay itself for non-completed calls to an SBR platform, using money collected from the SBR. The SBR, on the other hand, will be forced to pay for non-completed calls with money from other sources. Conceivably, the SBRs could end up paying more to IXCs for non-completed calls than they can collect for completed calls. In any event, the SBRs would be placed at a severe competitive disadvantage vis-à-vis the IXCs. Thus, Worldcom's proposal creates a windfall for vertically integrated IXCs as well as independent PSPs, while effectively running the SBRs out of business.

If the Commission determines to redefine a completed call, it should not adopt Worldcom's proposal. Rather, in order to maintain a more level playing field and the continued viability of SBRs, the Commission should redefine a completed call to include all calls completed to a platform, whether the platform belongs to the IXC itself or to its SBR. Better yet, the Commission should simply retain the current definition of a

completed call.

- B. The Commission should not adopt specific timing surrogates to determine call completion, or, in the alternative, if the Commission does adopt such surrogates, they should be based on an independent study of call completion rates and average time to complete each type of compensable call.**

The congressional mandate to the Commission is to devise a system that “ensures” fair compensation for “each and every” completed call from a payphone. *See* 47 U.S.C. § 276(b)(1)(A). The Commission does not have the luxury or discretion to adopt a system that only approximates the number of completed calls, where it is possible to ascertain the actual number. A timing surrogate is nothing more than an estimate that would be used in lieu of actual call completion data. There is no evidence of technical impossibility of determining the actual number of completed calls from a payphone. In fact, a call detail record is created and maintained by some carrier (either the IXC or its SBR) for every completed call, since without such a record the party responsible for paying for the call could not be billed.⁵ From such records may be extracted the information to determine the precise number of compensable calls from any particular payphone. That the carriers have consistently designed their payphone compensation systems not to record call detail does not mean that it cannot be done, nor that it could not have been done in the beginning. The IXCs have generally sought to avoid responsibility for payphone compensation, notwithstanding that in the final analysis, they do not bear

⁵ Global Crossing contends that “neither carrier independently can see the call end-to-end to determine if that call has been completed and is, therefore, compensable.” Global Crossing Petition at ii. However, the SBR

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the cost, but pass it on to their customers (both SBRs and retail customers). IXCs should not be heard to complain about the costs of converting their payphone compensation systems to provide more detailed reports to PSPs, so that, at last, the PSPs can have the ability to verify the accuracy of the payments received from IXCs.

Admittedly, a timing surrogate such as the one proposed by Global Crossing is more equitable than the proposal advanced by Worldcom. At least with a timing surrogate, an SBR would have some assurance that it would not be reimbursing IXCs for all of the non-completed calls received at its switch, and the IXC would not be required to pay payphone compensation to PSPs for all non-completed calls sent to the SBR's switch.

However, a timing surrogate is, as Global Crossing acknowledges, not a perfect solution. *See* Global Crossing Petition at 8. A timing surrogate would necessarily entail two types of errors: some calls that would otherwise not be eligible for compensation would be compensated (i.e. a call whose duration exceeds the criterion but is not actually completed), while calls that would otherwise be eligible for compensation would not be compensated (i.e. a call whose duration does not meet the criterion but is actually completed). To be equitable and achieve the overall goal of fair compensation for all completed calls, the surrogate would have to be designed to exactly balance and thus mutually offset the two types of errors. Conceptually, this might be done on a global

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that completes a call surely can determine that the call has been completed; indeed, it must do so in order to be able to bill the call. It is only the first IXC that cannot "see" the completion of a call routed to an SBR.

basis. The problem, however, is that because the rate for each type of error undoubtedly varies from PSP to PSP, no PSP would be compensated precisely for “each and every” completed call from its payphones. Some would be overcompensated, while others would be undercompensated.

The Commission has already considered and rejected a timing surrogate proposal in its initial order in this docket:

A number of commenters contend that the Commission should use a duration surrogate for completed calls. We conclude that exempting calls from per-call compensation because they are not of a requisite duration, whether 25 seconds or 60 seconds, would not be in accordance with Section 276’s mandate that “each and every completed intrastate and interstate call” be compensated.

September 20, 1996 Order, ¶ 63, emphasis in original.

If the Commission decides to overrule its prior analysis and conclusion, and to adopt a timing surrogate in lieu of a system that pays compensation based on actual call completion, the surrogate criterion should be established through an independent study of call completion rates and average call duration for each type of compensable payphone call. Global Crossing proposed an overall criterion of 25 seconds, but failed to explain how it arrived at that number. Similarly, Global Crossing’s proposal does not distinguish between subscriber 800 calls and access code calls, although there are likely significant differences in the average completion time and completion rate for those categories of calls. There is no evidence on the record of this case to justify a 25-second criterion or duration of any other length. Thus a study would be required to establish an appropriate timing surrogate, and even then, there is no guarantee that it would compensate every PSP for “each and every” compensable call from a payphone.

C. The current definition of a completed call is fair, workable, and should be retained.

If the Commission retains the original definition of a completed call as one answered by the called party, IXCs can comply by requiring their SBRs to provide completion information. In that way, the IXCs can accurately track each and every completed call, including calls routed through SBRs, and pay compensation to PSPs accordingly.

SBRs have the ability to identify and record call detail information on completed payphone calls, since their ability to bill for such calls depends on that information. Having such information, an SBR can provide it to its IXC. Worldcom complains that it would have to re-engineer its systems at “prohibitive” cost to be able to receive such data in different formats from different SBRs. However, Worldcom fails to specify those costs. Worldcom argues that it has “hundreds” of SBRs, implying that it would have to develop separate software for each one for Worldcom to be able to receive data feeds containing each SBR’s call completion data.⁶ Again, Worldcom fails to provide any evidence to support such an allegation. It is unlikely that Worldcom has information about its SBRs’ systems sufficient to reach the unsupported conclusions that it asserts.

The specter raised by Worldcom is a red herring. There is no evidence to support Worldcom’s position. Indeed, since Worldcom is in a contractual relation with all of its

⁶ In fact, Worldcom has required at least some, if not all, of its SBRs to agree to assume sole responsibility to pay payphone compensation directly to PSPs for all compensable calls routed to the SBRs, and to indemnify Worldcom against all claims for payphone compensation for such calls.

SBRs, it could solve its “problem” by requiring all of its SBRs to transmit the call completion data in a standard format or to use software specified or provided by Worldcom. Similarly, there is no evidence to support Worldcom’s fears of security breaches or viruses from SBR data feeds. Worldcom has ample access to security systems that could detect and prevent any damage from corrupt data or viruses. The cost of such protection is simply one of the necessary components of the requirement for IXC’s to be responsible for tracking completed calls.

Worldcom also argues that unless its proposal were adopted, the system set forth in the Second Order would perpetuate and foster disputes over the accuracy of compensation, because of the possibility of receiving inaccurate or unverifiable data from its SBRs. *See* Worldcom Petition at 3. This too is a red herring and scare tactic. If an SBR provides call completion data to its IXC, there would be no reason for a PSP to look “downstream” to the SBR in the event of a dispute, because the IXC would already have the same data that the PSP could obtain from the SBR. If a PSP were inclined to dispute call completion data, it is just as likely to dispute the IXC’s data as to dispute the data of an SBR; accordingly, Worldcom’s proposal would not eliminate or significantly reduce the possibility of disputes.

The Commission’s original definition of a completed call is sound and fair, and should not be changed. Rather, the Commission should permit IXC’s to require their SBRs to provide call completion data so that the IXC’s can accurately track calls to completion. If the SBRs fail or refuse to provide completion information to their IXC’s, then the SBRs should be responsible to reimburse the IXC’s for payments to PSPs for

calls connected to the SBR switch that are not answered by the called party. That would provide an adequate incentive for SBRs to supply the completion data to their IXC's. Thus the congressional mandate of fair compensation for each and every completed call from a payphone could be met. Alternatively, if the Commission decides to redefine a completed call to include calls routed to a switch or platform, it should apply the definition uniformly to both IXC's and SBRs. Or if the Commission decides to adopt a timing surrogate, the surrogate should be based on an independent study.

II. THE COMMISSION SHOULD CLARIFY THAT IXCs MAY NOT RECOVER REIMBURSEMENT FROM SBRs FOR PAYPHONE COMPENSATION PAID TO PSPs FOR NON-COMPLETED CALLS, NOR FOR THE COST OF TRACKING NON-COMPLETED CALLS.

The Second Order “requires each reseller or debit card customer whose number is dialed on a coinless basis to reimburse the first facilities-based carrier for the amount paid by that carrier to the PSP and for that carrier’s cost of tracking the call and providing such information to the PSP.” Second Order ¶ 2.⁷ Assuming the original definition of a completed call is retained, such language could be wrongly interpreted to require SBRs to reimburse IXCs not only for payphone compensation paid to PSPs for compensable, completed calls, but also for compensation paid for calls routed to SBRs that are not completed. Under such an interpretation, IXCs would have a powerful incentive to pay

⁷ See also, Second Order ¶ 11 (“The underlying facilities-based carrier may then obtain reimbursement of the compensation from the switchless or switch-based reseller.”); ¶ 21 (“We also revise section 64-1310(b) to permit the underlying facilities-based carrier to obtain reimbursement from resellers and debit card providers for the compensation paid to PSPs for calls carried on their account and for the cost of tracking those calls.”). The regulation itself provides that the first facilities-based carrier “may obtain reimbursement from its reseller and debit card customers for the compensation amounts paid to payphone service providers for calls carried on their account and for the cost of tracking *compensable* calls.” [emphasis added]

PSPs for all calls routed to their SBRs, rather than to go to the trouble to actually track such calls to determine if they are compensable.⁸ That is, IXC's would pay PSPs for all calls to an SBR platform, because they would know that the gratuitous payment for non-completed calls could be recovered from the SBRs. Such a practice might reduce the number of disputes with PSPs, who would benefit from the payments for non-completed calls, but that benefit would be at the expense of the SBRs, who, as explained above, could not recover the cost and remain viable competitors. It is doubtful that the Commission intended such an unjust result, but the risk exists that IXC's will seek to hold SBRs liable for such gratuitous payments, relying on the quoted language in the Second Order. The Commission should clarify the Second Order to expressly limit the IXC's' right to reimbursement from SBRs to payments for compensable, completed calls, and not permit reimbursement for non-completed calls. Furthermore, the Commission should clarify that only completed calls that carry payphone specific coding digits are eligible for reimbursement, because in the absence of such coding digits, SBRs cannot determine whether a call is made from a payphone. SBRs should not be expected to provide call completion information for all calls to their switches (which would include calls from all types of phones, not just payphones).

III. THE COMMISSION SHOULD REQUIRE IXC's TO REIMBURSE SBRs FOR THE COST OF TRACKING A PAYPHONE CALL FROM THE

⁸ For example, AT&T states that its "general practice has been to pay payphone compensation to PSPs at the Commission-established rate for all calls that complete to a switch-based reseller's switching platform, whether or not such calls are completed to the called party." AT&T Petition at 2-3. Worldcom's approach is slightly different, but would have the same result, by redefining a completed call to include all calls to an SBR's platform.

SBR's SWITCH TO COMPLETION, OR IN THE ALTERNATIVE SHOULD REQUIRE IXCs AND SBRs TO BEAR THEIR OWN COSTS OF TRACKING.

The Second Order requires the first IXC to track compensable calls from payphones, including calls routed to SBRs, but permits IXCs to obtain reimbursement from their SBRs “for the cost of tracking compensable calls.” 47 C.F.R. § 64.1310(b). Presumably the cost of tracking is allocated to SBRs because they are deemed to be the “primary economic beneficiaries” of a compensable call. *See* First Order on Reconsideration ¶ 92. However, it should be borne in mind that for every completed call routed through an SBR, both the SBR and the IXC are economic beneficiaries, since each receives some compensation for the call—the IXC receives compensation from the SBR, and the SBR receives compensation from the calling party (in the case of access code calls) or the called party (in the case of toll free calls). It is not entirely clear for any particular call or class of calls why the SBR should be designated the “primary” economic beneficiary, nor is there any evidence on the record to support that conclusion (such as evidence of the relative profit earned by an SBR from a payphone call, as compared to the profit earned by the IXC for delivering the call to the SBR’s platform).

A call routed to a platform has at least two legs. The IXC can easily track the first leg of the call, from the payphone to the platform. The owner of the platform (whether IXC or SBR) can track the second leg of the call, from its platform to completion. Given the Commission’s order making IXCs responsible for tracking a call routed through an SBR, the logical conclusion would be that IXCs, which bear the responsibility, should also bear the expense, of tracking the entire call. Accordingly,

IXCs should bear their own costs for tracking the first leg of the call, and should reimburse SBRs for the SBRs' costs of tracking the second leg of the call.

Alternatively, under the principle that IXCs and SBRs are both economic beneficiaries of payphone calls, then the IXCs should bear the cost of tracking the first leg of the call, while SBRs should bear the cost of tracking the second leg.

The third alternative, to require SBRs to bear the entire cost of tracking both legs of a call, including the leg from the payphone to the SBR platform (which function is performed by the IXC), makes the least sense of all. Accordingly, the Commission should reconsider its conclusion that requires SBRs to reimburse IXCs for the entire cost of tracking compensable calls.

IV. PROPOSALS TO REQUIRE SBRs TO REIMBURSE IXCs FOR NON-COMPLETED CALLS WOULD INJURE COMPETITION.

One of the purposes of the Telecommunications Act of 1996 is to foster competition in the provision of telecommunications services. *See* First Payphone Order ¶¶ 2-3 (“The 1996 Act erects a ‘pro-competitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.’” [quoting S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess 1 (1996)]). SBRs perform a valuable role in that process, creating a robust wholesale marketplace to compete with the retail services offered by an ever smaller number of large, facilities-based IXCs. Thus SBRs multiply the number of competitors for long distance service, counteracting concentration in the market. A lessening of concentration in the

market for long distance services tends to increase competition and lower prices to the consumer.

As explained above, any requirement for SBRs to reimburse IXC for calls routed to an SBR platform that are not answered by the called party (whether resulting from interpretation of the current regulation or from changing the definition of a completed call, as proposed by Worldcom), creates a dangerous risk of lessening competition for telecommunications services. Because SBRs would have to increase their prices for completed calls to cover the cost of reimbursement for non-completed calls, SBRs would be less able to compete effectively against the IXCs, at the same time that the IXCs that operate payphones would be reaping a windfall from the reimbursement for non-completed calls. Thus, if SBRs are required to reimburse IXCs for such calls, there is a substantial risk that many, if not all, SBRs will be unable to remain as viable competitors.

Similarly, requiring SBRs to bear the entire cost of tracking calls to their switches also raises antitrust concerns. If the IXCs shift the costs of tracking completed calls to the SBRs and yet do not bear that burden themselves for their own operations as operators of platforms that compete directly with SBRs, it will place the independent SBRs at a significant competitive disadvantage. This would lead to an elimination of independent SBRs, a furthering of concentration in the industry and eventually an increase in prices to the consumers.⁹

⁹ It should be noted that if the FCC puts its imprimatur on Worldcom's proposal, it would significantly increase the difficulty of any private antitrust action challenging anti-competitive practices of the large, vertically integrated IXCs.

The Commission should not be distracted from the clearly articulated Congressional purpose of protecting and promoting competition in the telecommunications industry. Accordingly, it should not be tempted to adopt any rule that would have the likely effect of eliminating competitors, and hence reducing competition.

V. THE COMMISSION SHOULD RETAIN THE REPORTING REQUIREMENTS SET FORTH IN THE SECOND ORDER, AND ADDITIONALLY REQUIRE EACH IXC TO MAINTAIN CALL DETAIL RECORDS SUPPORTING THE DATA TO BE REPORTED, AND MAKE SUCH CALL DETAIL RECORDS AVAILABLE TO PSPs.

AT&T,¹⁰ Worldcom,¹¹ and Global Crossing¹² all complained that the new reporting requirements would entail undue burden and expense. However, none of those IXCs provided adequate or detailed evidence of the magnitude of the alleged burden.¹³ Similarly, none of the IXCs even mention the vast profits they earn from payphone calls, which would more than offset the cost of complying with the Second Order. Nor do they

¹⁰ AT&T complains that the reporting requirements set forth in the Second Order would require AT&T and other IXCs “to perform considerable additional work.” AT&T Petition at 5.

¹¹ Worldcom resists the reporting requirements of the Second Order on the grounds that they are “not necessary and would increase reporting storage requirements by 15 fold.” Worldcom Petition at 5.

¹² Global Crossing argues that complying with the reporting requirements of the Second Order is unnecessary and will impose undue burden on the IXCs. See Global Crossing Petition at 2, 8.

¹³ AT&T estimates that the additional work would “take approximately 18 months and millions of dollars to make the necessary systems changes.” AT&T Petition at 6. However, AT&T provides no more precise representation, much less evidence, of the estimated magnitude of the cost (e.g. whether it is two million or two hundred million dollars). Worldcom argues that the new reporting requirements “would increase reporting storage requirements by 15 fold,” but does not quantify the estimated cost or provide any further support for its statement. Worldcom Petition at 5. Global Crossing notes that there are approximately 2 million payphones and thousands of PSPs, and argues that the rule would require IXCs to generate “a massive amount of call detail and find a way to provide these reports to thousands of PSPs. This requirement . . . would require facilities-based interexchange carriers to devote thousands of person-hours to generate these reports.” Global Crossing Petition at 8.

acknowledge that whatever costs they may have to incur are passed on to their customers.

Worldcom states that two primary reasons for disputes between PSPs and IXC's revolve around "uncertainty surrounding the number of calls completed by SBRs, and 2) uncertainty surrounding the number of completed calls given the need to perform surrogate estimates due to the slow and irregular manner in which local exchange companies (LECs) implemented FLEX ANI." Worldcom Petition at 5. However, Worldcom fails to admit that PSPs' lack of access to the very information now being required by the Commission has also been a primary reason for such disputes, which have resulted in lengthy and costly discovery battles in the courts.

The Commission's reporting requirements are based on the conclusion that a PSP must receive call completion information "to enable the PSP to verify the accuracy of compensation it received for coinless, compensable calls and/or to bill the underlying facilities-based carrier." Second Order ¶ 11. Further, the Commission has reiterated that PSPs must receive "adequate information . . . to ensure that [PSPs] are compensated for every compensable call." *Id.* ¶ 16. For those reasons, the Commission concluded as follows: "[W]e revise section 64.1310(a) to impose upon the [first] facilities based carrier the responsibility . . . to send back to the PSP a statement indicating the number of completed toll-free and access code calls that it has received from each of that PSP's payphones, unless the PSP agrees otherwise." *Id.* ¶ 21.

In order for a PSP to verify the accuracy of payphone compensation, it must be able to identify, for each call made from one of its payphones, the carrier responsible for paying payphone compensation. The only information that may be available to the PSP

from its smart phones is the number dialed, the date, time, and duration of the call. Such information does not identify the carrier, nor even indicate whether the number dialed is an access code number or a toll free number. To obtain identifying information, the PSP must obtain information from some other source connecting the number dialed to a specific carrier. Prior to the Second Order, such a process required inordinate sleuthing, network queries, and/or LEC tracking reports, all of which were costly and should have been unnecessary. The Second Order improved that situation by requiring IXCs to report, for each payphone, the access code and toll free numbers for which each IXC is responsible, as well as the volume of calls made to each of those numbers. Such information is necessary for PSPs to be able to even begin to verify payphone compensation. The Commission should not be swayed by IXCs' vague allusions to undue burden from having to supply such information. If anything, the Commission should strengthen the process by requiring IXCs not only to provide such information, but to maintain call detail records supporting such information in a readily accessible form, and to make such records available to PSPs, on request, so that PSPs can perform a meaningful audit of the payphone compensation received, if such audits are desired.

Global Crossing's proposal to modify the rule to require reporting only of compensable calls, *in the aggregate* (see Global Crossing Petition at 9), would perpetuate the same uncertainty and controversy that the Second Order tries to avoid. A major reason why PSPs have been forced to rely on litigation to resolve controversies about the number of completed calls for which they are entitled to compensation is that IXCs have designed their payphone compensation systems to produce unverifiable summary data.

IXCs expect PSPs to accept the IXCs' peg counts of calls without question. But without call detail records, it is impossible for a PSP to determine whether any particular call from a payphone is being compensated.

Global Crossing's proposal to report only compensable calls in the aggregate does not solve the problem that led the Commission to adopt the rule, namely that PSPs need to have both payphone-specific and carrier-specific data to verify the accuracy of payments from IXCs. Flying J urges the Commission not to abrogate the necessary requirement for IXCs to report payphone-specific data and the access code and toll free numbers delivered by the serving LEC from each payphone, because without such data, PSPs cannot verify the accuracy of IXC call counts and associated payments. Such data would help to reduce controversy between PSPs and IXCs. Indeed, the Commission should go farther and require IXCs to store and to make available to PSPs, on request, the call detail supporting the reports showing the volume of access code and toll free calls from each payphone. Such call detail would allow meaningful audits, would counteract the temptation for IXCs to short-change PSPs, and would provide a basis for resolving most disputes about payphone compensation.

VI. THE COMMISSION CANNOT AND SHOULD NOT RESTRICT PSPs' ABILITY TO BILL CARRIERS FOR PAYPHONE COMPENSATION.

Global Crossing acknowledges its responsibility to pay payphone compensation to PSPs under the Second Order, and cannot deny PSPs' entitlement to receive such compensation. Yet Global Crossing wants to have the Commission cut off the PSPs' ability to make demand on IXCs, via invoices, for the compensation to which they are

entitled. Global Crossing would undoubtedly like to extend this argument to deny PSPs the ability to pursue available remedies when there is disagreement between a PSP and an IXC over the amount owed. In particular, Global Crossing wishes to prevent PSPs from initiating any form of action, including litigation, to collect payphone compensation from IXCs that fail to pay the full amount owed.¹⁴ The result of Global Crossing's proposal would be to permit IXCs to short-pay PSPs with impunity, or to force PSPs to bring collection actions only before the Commission. However, the Commission is not the only forum for an aggrieved PSP to seek relief, and should not be the forum of choice for collection actions. The Communications Act specifically permits an aggrieved party to elect to bring an action against a carrier before the Commission or in district court. *See* 47 U.S.C. §§ 206-208. The Commission has no right to rewrite that statute, nor to impose any rule or regulation that has such an effect.

PSPs are entitled to make demand on IXCs for payphone compensation. Indeed, the Commission acknowledges as much, in its conclusion that the first underlying facilities-based carrier to whom the LEC delivers the compensable call must “send to the PSP call completion information to enable the PSP to verify the accuracy of compensation it receives for coinless, compensable calls *and/or to bill the underlying facilities-based carrier.*” Second Order ¶ 11 (emphasis added). If an IXC believes that it does not owe the amount stated on a PSP's invoice, the IXC can simply refuse to pay and

¹⁴ Global deems payphone compensation litigation “an abuse of the Commission's rules.” Global Crossing Petition at 11.

so notify the PSP. Then the PSP may pursue the remedies available to it under the law.

VII. LECs SHOULD PAY PAYPHONE COMPENSATION FOR COMPENSABLE CALLS COMPLETED ON THEIR NETWORKS.

Flying J concurs with Bulletins that the Second Order, perhaps inadvertently, introduces some uncertainty about whether coinless payphone calls completed by a LEC without being transferred to an IXC are still compensable, and about who should be responsible for paying payphone compensation for such calls. The Commission should clarify that all coinless calls from a payphone are compensable, whether they are routed to an IXC or are completed within the LEC's network. The party responsible for tracking and paying for such calls should be the LEC that routes the call through its access tandem switch (typically the incumbent LEC), since that is the entity that is usually capable of tracking the call to completion. In cases where one LEC routes the call to another LEC that actually completes the call, the same rules governing IXC-SBR payment and reporting requirements should apply, so that the PSP has the full opportunity to audit its compensation payments. Further, where a competitive LEC delivers payphone calls to an IXC through an incumbent LEC's access tandem switch, the IXC should still be responsible for payphone compensation. The Commission should clarify the Second Order to the extent necessary to accomplish this result.

VIII. THE COMMISSION SHOULD CLARIFY THAT THE SECOND ORDER APPLIES FROM OCTOBER 7, 1997 FORWARD.

To avoid confusion and controversy about whether the Second Order applies prospectively only or retroactively as well as prospectively, the Commission should expressly declare that the Second Order on Reconsideration applies retroactively to the

effective date of the original payphone compensation order, October 7, 1997. Both the designation of the Second Order as being “on Reconsideration,” as well as the analysis contained therein, compel the conclusion that the order is intended to cover the entire period of payphone compensation. The Commission’s references to the consistency between the Second Order and the First Payphone Order amply demonstrate the Commission’s intent to reinstate the original order with respect to the relative responsibilities of IXC’s and SBR’s to pay payphone compensation and to track calls. *See* Second Order ¶¶ 11 (“we generally reconfirm the compensation plan adopted in the *First Payphone Order*, but we modify the rules to reflect the Commission’s statements in that order”), 15 (“This rule is consistent with the Commission’s finding in the *First Payphone Order* . . .”), 18 (“We also conclude, consistent with the Commission’s decision in the *First Payphone Order*, that facilities-based carriers may recover from their reseller customers . . .”). Accordingly, the Commission should clarify that the Second Order is indeed intended to apply both retroactively and prospectively.¹⁵

Dated this 9th day of October, 2000.

RAY, QUINNEY & NEBEKER

By

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¹⁵ *See S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 826 F.2d 1074, 1081 (D.C. Cir. 1987); *Retail, Wholesale and Department Store Union v. N.L.R.B.*, 466 F.2d 380, 389-90 (D.C. Cir. 1972).

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